

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
JOSEPH P. MENTOR, dba MENTOR  
CONSTRUCTION COMPANY and  
HOLIDAY INNS, INC.,

Appellant,

v.

PUGET SOUND AIR POLLUTION  
CONTROL AGENCY,

Respondent.

PCHB No. 79-162

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

THIS MATTER, the appeal from a \$250 civil penalty for the alleged violation of Sections 8.02(3), 8.02(5) and 8.05(1), came before the Pollution Control Hearings Board, Chris Smith and David Akana (presiding), at a formal hearing in Tacoma on February 1, 1980.

Appellants appeared through Joe Mentor; respondent was represented by its attorney, Keith D. McGoffin.

Having heard or read the testimony, having examined the exhibits, and having considered the contentions of the parties, the Board makes

1 these

2 FINDINGS OF FACT

3 I

4 Appellants own or control a nine-acre site located at 5640 Kitsap  
5 Way in Bremerton, Washington. During pertinent times herein,  
6 appellants were constructing a building on the site and were storing  
7 valuable building material and waste material from the construction  
8 site on land being developed as a parking lot for the building under  
9 construction. The land on which the waste material and building  
10 material was placed was not owned by the appellants, but was part of  
11 an unused road right-of-way which was owned by the city of Bremerton.  
12 Even though the appellants were still in the process of securing a  
13 formal permit from the city, they had improved the right-of-way for  
14 parking lot purposes and had built a protective bulkhead between the  
15 parking lot and Kitsap Way, a public street. The appellants exercised  
16 control over the right-of-way property and used it for their own  
17 purpose with informal permission of the city. By the time of the  
18 trial a formal permit had been issued to the appellants.

19 II

20 On June 18, 1979, at about 4:16 p.m., respondent's inspector saw a  
21 large black plume of smoke coming from the waste material located next  
22 to the site. When he arrived, the fire department was extinguishing  
23 the 20' x 40' x 2' high burning materials. The contents of the fire  
24 included scrap lumber, foam insulation, insulated ceiling panels,  
25 plastic pipe, visqueen, carpet scraps, vinyl floor covering, oyster  
26 shells and beer and pop cans. None of respondent's witnesses observed

1 any of appellants' employees at the scene of the fire. There was no  
2 evidence that appellant or any of their employees ignited the fire.  
3 The fire started from an unknown cause.

4 Although there is no evidence that appellants' employees ignited  
5 the fire, the evidence is clear that they did nothing to put it out  
6 after it started even though they were engaged in constructing a  
7 building which extended to within about 100 feet from the fire.

8 Appellants did not possess a permit for the fire in question.

### 9 III

10 For the foregoing event, appellants were issued three notices of  
11 violation from which followed a \$250 civil penalty for the alleged  
12 violation of Section 8.02(3), 8.02(5), and 8.05(1) of Regulation I.

### IV

14 Pursuant to RCW 43.21B.260, respondent has filed with this Board a  
15 certified copy of its Regulation I and amendments thereto, which are  
16 noticed.

17 Section 8.04(b) states it shall be prima facie evidence that the  
18 person who owns or controls property on which an outdoor fire occurs  
19 has caused or allowed said outdoor fire.

20 Section 8.02(3) makes it unlawful for any person to cause or allow  
21 an outdoor fire containing, inter alia, garbage, petroleum products,  
22 paint, rubber products, plastics or any substance other than natural  
23 vegetation which normally emits dense smoke or obnoxious odors.

24 Section 8.02(5) makes it unlawful for any person to cause or allow  
25 any outdoor fire in violation of any applicable law, rule or

26  
27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 regulation of any governmental agency having jurisdiction over such  
2 fire.

3 Section 8.05(1) makes unlawful any outdoor fire other than  
4 landclearing or residential burning except with the prior written  
5 approval of respondent.

6 Section 3.29 provides for a civil penalty of up to \$250 per day  
7 for each violation of Regulation I.

8 V

9 Any Conclusion of Law which should be deemed a Finding of Fact is  
10 hereby adopted as such.

11 From these Findings, the Board comes to these

12 CONCLUSIONS OF LAW

13 I

14 The appellants were not the owners of the property where the  
15 burning took place, but they were in defacto control of it.

16 II

17 The material which burned on premise under the control of the  
18 appellants was prohibited material within the provision of Section  
19 8.02(3).

20 III

21 Under the provisions of Section 8.04(b) the respondent established  
22 a prima facie case that the appellants had allowed the outdoor fire to  
23 burn. The appellant did not rebut the prima case, since they produced  
24 no evidence that their employees in fact were ignorant of the fact  
25 that the fire was burning about 100 feet from the building they were  
26 working in.

1 IV

2 The appellants by failing to take reasonable precautions to put  
3 out the fire on property over which they had control, allowed an  
4 outdoor fire to burn prohibited material in violation of the provision  
5 of 8.02(3) even though they did not start the fire. There is no  
6 evidence, however, that the appellants or their employees knowingly  
7 (with scienter) violated Section 8.02(3).

8 V

9 The Court of Appeals for Division Two in its decision in Kaiser v.  
10 Puget Sound Air Pollution Control Agency, 25 Wn. App. 273 (1980) which  
11 was rendered on January 29, 1980, but which had not been published  
12 when the hearing took place, held that the element of scienter is  
13 necessary for the enforcement of a civil penalty. Accordingly, the  
14 \$250 civil penalty should be vacated.

15 VI

16 Any Finding of Fact which should be deemed a Conclusion of Law is  
17 hereby adopted as such.  
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1 From these Conclusions the Board enters the following

2 ORDER

3 The \$250 civil penalty is vacated.

4 DATED this 5<sup>th</sup> day of June, 1980.

5 POLLUTION CONTROL HEARINGS BOARD

6  
7   
8 NAT W. WASHINGTON, Chairman

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10  
11 CHRIS SMITH, Member

12   
13 DAVID AKANA, Member